FILE COPY

SUPREME COURT, U.S.
FILED
MAY 31 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. ~~Q-1~~ 114

MRS. SYBIL MAE FLOERSCH, FORMERLY MRS. SYBIL M. BENTON, INDIVIDUALLY; AND A. J. FLOERSCH AND BANK OF NEW MEXICO, AS EXECUTORS UNDER THE LAST WILL OF WILLIAM E. BENTON, DECEASED,

Petitioner.

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J. R. Modrall
Counsel for Petitioner
1200 Simms Building
Albuquerque, New Mexico.

C. Derwood Knight
William J. Sullivan
Of Counsel.

INDEX

	Page
OPINIONS BELOW	1
REASONS FOR GRANTING THE WRIT	2
STATUTES INVOLVED	2
JURISDICTION	2
STATEMENT OF THE CASE	2
QUESTION PRESENTED	4
JURISDICTION IN THE FIRST INSTANCE	4
ARGUMENT	5
CONCLUSION	9
APPENDIX A—Opinion, District Court	
APPENDIX B—Opinion, Circuit Court of Appeals	
APPENDIX C—Statutes Involved	
APPENDIX D—Judgment, Circuit Court of Appeals	

AUTHORITIES

CASES:

Oswego Falls Corp. v. Commissioner, 26 B. T. A. 60, affirmed 71. F. 2d 673	6
Sheaffer, W. A., Pen Co. v. Commissioner, 27 B. T. A. 1056	6, 7

STATUTES:

Internal Revenue Code of 1939	
Section 51 (26 U. S. C. 1952 ed., Sec. 51)	5, 7, 8
Section 275 (26 U. S. C. 1952 ed., Sec. 275)	5
Section 311 (26 U. S. C. 1952 ed., Sec. 311)	5, 8
Section 29-1-9, New Mexico Statutes Annotated, 1953	8

IN THE

Supreme Court of the United States

October Term, 1960

No.

MRS. SYBIL MAE FLOERSCH, FORMERLY MRS. SYBIL M. BENTON, INDIVIDUALLY; AND A. J. FLOERSCH AND BANK OF NEW MEXICO, AS EXECUTORS UNDER THE LAST WILL OF WILLIAM E. BENTON, DECEASED,

Petitioner.

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Mrs. Sybil Mae Floersch, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case, March 21, 1960.

OPINIONS BELOW

The opinion of the District Court (infra, Appendix A, pp. 1-4) is reported in 171 F. Supp. 260. The opinion of the Court of Appeals (infra, Appendix B, pp. 1-5) has not yet been reported.

REASONS FOR ALLOWANCE OF THE WRIT

1. The assessment and collection of the deficiency in tax and interest involved in the cause was barred by the Statute of Limitations since the taxpayer (Petitioner), being primarily liable, is governed by the 5 year period of limitation.

2. The decision herein appears to be in conflict with an applicable decision of another Court of Appeals.

STATUTES INVOLVED

Internal Revenue Code of 1939:

Sec. 51 (26 U. S. C. 1952 ed., Sec. 51)
Sec. 275 (26 U. S. C. 1952 ed., Sec. 275)
Sec. 311 (26 U. S. C. 1952 ed., Sec. 311)

Sec. 29-1-9, N. M. S. A. 1953

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 21, 1960 (infra, Appendix D, p. 19). The jurisdiction of this court is invoked under the provisions of 28 U. S. C. A. Section 1254(1).

STATEMENT OF THE CASE

This was a suit for the refund of payments made by the plaintiff Mrs. Sybil Mae Floersch as transferee for the liability of her former deceased husband for income taxes for the year 1950. The District Court allowed plaintiff's motion for summary judgment "on the ground that the tax and interest in issue were paid after the Statute of Limitations had run against the assessment and collection

thereof, and that there is no genuine issue as to any material fact with respect to this ground of recovery". The motion was based upon the pleadings — the complaint, the answer, the supporting affidavit of the appellees, and the affidavit and supporting documents submitted by counsel for the Government in opposition to the motion. The facts disclosed by these documents may be briefly stated.

Plaintiff Mrs. Sybil Mae Floersch, the only interested plaintiff herein, was the wife of William E. Benton, since deceased, at the time they filed a joint federal income tax return for the year 1950 on March 15, 1951, showing a total gross income of $21,338.21. The amount of income tax shown on the return was timely paid. The said return "understated the gross income of Mr. William E. Benton and the plaintiff, Mrs. Sybil Mae Floersch", by the amount of $91,628.18, which was an amount in excess of 25% of the amount of gross income stated in the return.

William E. Benton died May 12, 1953, and A. J. Floersch and the Bank of New Mexico became the duly qualified executors under his will. Pursuant to the provisions of Mr. Benton's will, assets of his estate having a market value in excess of $71,000 were transferred without consideration to Mrs. Floersch, and, considering Mr. Benton's indebtedness to the United States, said transfers rendered his estate insolvent.

On March 14, 1957, a statutory notice of deficiency was mailed to Mrs. Floersch by the District Director of Internal Revenue notifying her, pursuant to Section 311 of the Internal Revenue Code of 1939, that

> the determination of the income tax liability of Mr. William E. Benton for the year ended December 31, 1950, discloses a deficiency of $51,622.28 in income tax

as shown in the statement attached. The amount of the deficiency stated, plus interest as provided by law, constituting your liability as Transferee of the assets of said William E. Benton will be assessed against you.

The notice of March 14, 1957, further notified Mrs. Floersch of her right to petition the Tax Court for a review of the above deficiency determination, but no such petition was filed, and on June 14, 1957, there was assessed against Mrs. Sybil Mae Floersch, as transferee of William E. Benton, deceased, the principal amount of $51,622.28, and on June 28, 1957, interest in the amount of $19,329.36. The $51,622.28 was paid by Mrs. Floersch on June 11, 1957, and the $19,329.36 interest assessment was paid by her on July 8, 1957. A timely claim for refund of these amounts was filed by Mrs. Floersch and denied by the Commissioner and this action followed.

QUESTION PRESENTED

Did the Court of Appeals err when it ruled that petitioner was a transferee, thus enabling the Commissioner to proceed against her after the five (5) year Statute of Limitations had run but within the additional one year transferee provision.

JURISDICTION IN THE FIRST INSTANCE

Jurisdiction in the District Court was founded upon Section 1346 (a)(1) (Title 28 U. S. C. A.). Appeal to the Court of Appeals was under authority of Title 28 U. S. C. A. Section 1291.

ARGUMENT

The Court of Appeals erred in not holding that the assessment and collection of the deficiency in tax and interest involved in the case was barred by the Statute of Limitations since the taxpayer, (Petitioner), being primarily liable, is governed by the 5 year Statute of Limitations.

Petitioner's position throughout the case has been steadfast. The issue succinctly put is whether a person can be primarily liable for a tax and also liable as a transferee for the same tax. It has been and still is Petitioner's position that the answer to such a question is an emphatic "no".

Section 311 (b) (1) of the Code provided an additional year for making assessment against a transferee. This additional year was no doubt provided mainly because of the time and effort required to trace the transferee, to find out what had become of the taxpayer's assets, who received them, how much had been received, where such transferee or transferees were located and whether such transferees still had sufficient assets to make it worthwhile to proceed against them.

What then is petitioner's status in relation to the liability in question?

Section 51 (b) (1) of the Code gives a clear answer to her liability as to the joint income tax return which she and Mr. Benton filed for 1950. This section states that if a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. Consequently the petitioner was just as liable for the tax as her then husband. Moreover, since the liability was several, she was separately liable for the entire tax which the Commissioner assessed under Section 275 (c) of the Code.

The various considerations involved in the need for an additional year, and mentioned earlier in the argument, have no relevance or application in this case.

Petitioner has found no case squarely in point involving a joint return of husband and wife, but cases involving corporation consolidation law, as well as consolidated returns of affiliated corporations, wherein one corporation signs an agreement to pay the entire tax, establish the principle that where one is directly liable for the tax, he cannot also be liable as a transferee and the one-year period for proceeding against him as a transferee is not available. Oswego Falls Corp. v. Commissioner, 26 B. T. A. 60, affirmed, 71 F. 2d 673, and Sheaffer, W. A., Pen Co. v. Commissioner, 27 B. T. A. 1056.

In the Oswego Falls Corporation Case, supra, the petitioner was the resulting corporation in a statutory consolidation under New York Law, by which it was directly liable for the debts of the component corporations. A deficiency was not imposed until the general limitations period applicable to a taxpayer had expired.

Both the Tax Court and the Circuit Court of Appeals held that the petitioner, being directly liable, was not a transferee, and the additional year to proceed was not available.

In the course of its opinion the Tax Court said (page 761):

> "... It is not both taxpayer and transferee. Aside from the foregoing reasons, there is a natural inconsistency in saying that the same entity is both a 'taxpayer' and a 'transferee'. The word 'taxpayer' when used in connection with 'transferee' connotes one from whom assets are transferred. 'Transferee' is used to designate to whom transferred. It would mean the same entity had transferred assets from itself to itself. A situation

which calls for such designation is indeed anomalous . . . ."

Since petitioner and her husband were each "the taxpayer", petitioner cannot, under any stretch of the imagination, be also a transferee.

Petitioner submits, therefore, that under this decision and the principles thereof as applied to joint returns of husband and wife, petitioner is not a transferee and consequently the additional tax was collected from her too late and after more than five years had run from the time of filing the joint return and, hence, was illegally collected and was under the Statute an overpayment refundable the same as any other overpayment (upon filing a timely claim for refund).

In the Oswego case just cited it was state law, more particularly New York corporation law, that made the petitioner directly liable as the taxpayer. In the instant case the principle is exactly the same, although it is the Federal income tax law and more specifically Section 51 (b) (1) that makes the petitioner directly and primarily liable as the taxpayer. Since the petitioner was directly liable as the taxpayer, she could not be liable as transferee since one obviously cannot be a transferee of himself.

This conclusion is likewise fortified by the decision of the Board of Tax Appeals (now the Tax Court) in the W. A. Sheaffer Pen Company Case, 27 B. T. A. 1056. In that case a consolidated return was filed and Form 1122 attached thereto contained a statement or agreement to the effect that none of the tax based on such return was to be paid by the Kraker Pen Company, one of the subsidiaries. The subsidiary was later dissolved and all of its assets taken over by Sheaffer. The Commissioner later determined additional tax liability with respect to Kraker with respect to the year

covered by the consolidated return, after the general statute of limitation had passed.

The Tax Court held the tax barred by the Statute of Limitations in concluding that Sheaffer was not a transferee but, on the contrary, was directly liable for the tax and the transferred assets were not imposed with any trust.

In the instant case, as in Sheaffer, the petitioner (Mrs. Floersch here and the Sheaffer Pen Company in the cited case) was directly liable for the tax. Being directly liable for the entire tax liability involved, she could not at the same time be liable as a transferee for either all or any part of it. There is, of course, an incidental difference between the two cases in that Mr. Benton, the other party to the joint return was also separately liable for the entire tax whereas in the cited case the Kraker Pen Company was never liable for any part of it. However, the broader principle involved in that case reaffirms the rule that the same taxpayer cannot be both directly and also liable as a transferee for the very same tax shown on a single tax return

It is true that Section 311 (f), Title 28 U. S. C. A. (Internal Revenue Code, 1939), defines the term "transferee" as including heir, legatee, devisee and distributee. The lower Court stated that at first blush, this provision might require placing the petitioner in the category of a transferee and hence in a position where the limitation period had not run at the time of the assessment. But it went on to state that this provision must be read in connection with Section 51 (b) (1) supra, which makes one filing a joint return primarily liable, and that the latter statute is controlling. Consequently, there is no need for invoking the provision of 29-1-9, N. M. S. A., 1953, since the petitioner is a taxpayer and not a transferee, and that the 5 year Statute of Limitations had run.

CONCLUSION

Petitioner, therefore, respectfully submits that she was not liable as a transferee but only in her individual capacity for the additional tax asserted upon the joint income return of herself and her husband. Therefore, the Commissioner had at most only five years from the time the 1950 return was filed on March 15, 1951, to assert a deficiency against her with respect to such tax or to collect the same without assessment. It follows that her payment of the additional tax was an overpayment as defined in Section 3770 (a) of the Code and is refundable to her.

Petitioner respectfully prays that the Petition of a writ of Certiorari be granted.

Respectfully submitted,
J. R. MODRALL
Counsel for Petitioner

C. DERWOOD KNIGHT
WILLIAM J. SULLIVAN
Of Counsel.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MRS. SYBIL-MAE FLOERSCH, formerly Mrs. Sybil M. Benton, individually, and A. J. FLOERSCH and BANK OF NEW MEXICO, as Executors under the Last Will of William E. Benton, deceased, *Plaintiffs*, vs. UNITED STATES OF AMERICA, *Defendant*.	No. 3949 Civil

DECISION OF THE COURT

This is an action to recover income taxes and interest paid under the provisions of the Internal Revenue Code of 1939, jurisdiction existing against the United States of America by Section 1346 (a) (1), Title 28 U. S. C. A., inasmuch as Plaintiffs paid the income tax and interest which they allege were illegally assessed and illegally collected by the District Director of Internal Revenue at Albuquerque, New Mexico. An Answer was filed by the United States of America after which the plaintiffs moved this Court for Summary Judgment on the ground that the tax and interest in issue were paid after the Statute of Limitations had run against the assessment and collection thereof.

The question posed in the case at bar is whether the Statute of Limitations had run at the time the tax and interest were paid, and this requires determination as to whether Mrs. Floersch was a taxpayer, jointly and severally liable with her then living husband, at the time of filing the

income tax return, or whether at the time of payment of the tax and interest here in question, she was a transferee.

Inasmuch as no cases have heretofore decided this question, the case is one of first impression, requiring an analysis of the facts as reflected by the pleadings, the applicable provisions of the Internal Revenue Code, 1939, and of case law in areas somewhat akin to that in question in this case.

Mrs. Sybil Mae Floersch, one of the plaintiffs, was formerly Mrs. Sybil M. Benton, and wife of William E. Benton, now deceased, at the time both of them filed their joint Federal Income Tax return on March 15, 1951, for the year 1950, with the Director of Internal Revenue, at Albuquerque, New Mexico. The husband, William E. Benton died on May 12, 1953, and thereafter the other plaintiffs in this action were appointed as Executors on the William E. Benton Will. On March 14, 1957, more than five years subsequent to the filing of the 1950 taxable year's return, the Commissioner issued a Notice of Deficiency to the now Mrs. Floersch. It charged a deficiency in income tax due from William E. Benton in respect to the 1950 income tax return in the amount of $51,622.28, and classified the widow, main plaintiff, as a transferee of decedant. On June 11, 1957, Mrs. Floersch paid the amount of the alleged deficiency, and on July 8, 1957, the interest thereon, maintaining at the times of payment that she denied the deficiency and stated that she was not a transferee, but was a taxpayer with a joint and several liability for the payment thereof, and that the deficiency was barred by the running of the statute of limitations.

It is provided in Section 51 (b) (1) of the Internal Revenue Code of 1939, Title 28 U. S. C. A. as follows:

"(b) Husband and Wife.

(1) In General. A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax

shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."

It is to be noted that the provision in that Section, making the liability for the tax covered by the return joint and several, strongly supports the plaintiffs' contention that Mrs. Floersch is primarily liable for the tax in question, rather than liable therefor as a transferee.

Section 275 (c) of the Internal Revenue Code of 1939, Title 26 USCA, provides in effect, that in the case of omission of gross income by a taxpayer in excess of 25% of the amount of gross income stated in the return, the tax may be assessed or court proceedings to collect the tax may be prosecuted at any time within 5 years after the return was filed. In this case, the tax return was filed March 15, 1951, and the assessment was not made until March 14, 1957. Section 311 (b) (1) Internal Revenue Code 1939, Title 28 USCA, relative to the period of limitation in claims against transferees provides in effect for an extension of one year after the period of limitation for assessment against the taxpayer. We thus see that if Mrs. Floersch was a primarily liable taxpayer, the suit was filed nearly a year after the period of limitation had run; while if she is a transferee, the Collector came in under the wire with a day to spare.

We find that Sec. 311 (f), Title 28 USCA (Internal Revenue Code, 1939), defines the term "Transferee" as including heir, legatee, devisee, and distributee. This provision at first blush, might require placing the individual plaintiff in the category of a transferee and hence in a position where the limitation period had not run at time of assessment. However, this provision must be read in connection with Sec. 51 (b) (1) supra, and it is the Court's considered opinion that the latter statute is controlling.

The Court concludes that a taxpayer who is jointly and severally liable for the payment of taxes due for the period for which the return is filed, is a primarily liable taxpayer, even though before the expiration of the 5 year period of

limitation that taxpayer may be clothed with the additional status of an heir, legatee, devisee or distributee.

The defendant vigorously and ably urges that the distribution of the assets of the Estate of William E. Benton caused the estate to become insolvent and unable to pay the income tax liability of William E. Benton, and that accordingly the taxes were properly and timely assessed against the plaintiff as a transferee. Defendant cites the cases of *Commissioner v. Green, 148 F. 2d 157, Hulburd v. Commissioner, 296 U. S. 300,* and *Nunan v. Green, 146 F. 2d 352,* and further contends that because, by New Mexico law, the husband is manager of the community estate, the husband was the primary taxpayer and that when his widow received the estate, she became a transferee. This latter contention overlooks the vast ambit of the law on Community Property in the State of New Mexico.

For a short case setting forth the gist of Community Property in this State, see *U. S. F. & G. v. Manuel C. Chavez and Mary C. Chavez, his wife, 126 Fed. Supp. 227.* Defendant could have taken steps against the husband, wife or estate any time up to March 15, 1956.

The cases of *Oswego Falls Corporation, 26 B. T. A. 1056,* and *Commissioner v. Stern, 357 U. S. 39,* seem more applicable to the case at bar than Defendant's authorities, and when considered along with the Court's view of the statutory law, hereinbefore expressed, require a granting of the Summary Judgment requested.

Accordingly, an Order granting a Summary Judgment to Plaintiff will be entertained within ten days from the date hereof.

Dated at Albuquerque, New Mexico, this 23rd day of March, 1959.

(s) WALDO H. ROGERS
U. S. District Judge.

OPINION

John J. Pajak (Charles K. Rice, Assistant Attorney General, and Lee A. Jackson, A. F. Prescott, Fred E. Youngman, Attorneys, Department of Justice, Washington, D. C., were with him on the brief,) for Appellant.

Derwood Knight (William J. Sullivan was with him on the brief) for Appellees.

Before HUXMAN, PICKETT and BREITENSTEIN, *United States Circuit Judges.*

HUXMAN, *Circuit Judge.*

This is an appeal from a summary judgment in favor of the plaintiff, the appellee here. The appellee instituted this action to recover income taxes and interest which she paid under protest. The assessment against her was as a transferee of assets of her former husband, now deceased. On March 15, 1951, Mrs. Sybil Mae Floersch and her then husband, William E. Benton, residents of New Mexico, filed their joint income tax return for the year, 1950. Benton died May 12, 1953. His estate was probated and closed in due course of time. Her husband's one-half interest in their community property, having a market value in excess of $71,000.00, was transferred to her without consideration. Considering Benton's indebtedness to the United States for the income tax subsequently assessed, the transfer of his one half interest in the community property to the appellee rendered his estate insolvent.

On March 17, 1957, a statutory notice of deficiency was mailed to Mrs. Floersch by the District Director of Internal Revenue notifying her, pursuant to Section 311 of the Internal Revenue Code of 1939, that,

> "... the determination of income tax liability of Mr. William E. Benton for the year ended December 31, 1950, discloses a deficiency of $51,622.28 in income tax

as shown in the statement attached. The amount of the deficiency stated, plus interest as provided by law, constituting your liability as Transferee of the assets of said William E. Benton will be assessed against you."

More than five years had passed from the date of the filing of the return so no assessment could be made against his estate even if the transfer of his one-half of the community property by will to his wife had not left his estate insolvent. But the assessment against her as transferee was made within the additional year provided for by Section 311 (b) (1) for assertion of transferee liability.

Appellee paid the tax and penalty interest under protest and then instituted this action to recover the same. In her complaint, she challenged the validity of the assessment. But as the summary judgment was based on the sole ground that since she was primarily liable for the tax she could not be liable as a transferee, the merit of her assertion of invalidity of the assessment is not before us for determination.

In Paragraph 5 of its answer, the Government alleged that, "Pursuant to the provisions of said William E. Benton's will, assets of his having a market value in excess of $71,000 were transferred without consideration to the plaintiff, Mrs. Sybil Mae Floersch, and considering said William E. Benton's indebtedness to the United States, said transfers rendered his estate insolvent." The motion for summary judgment admits the truth of these allegations. In fact, appellee does not contend that she holds these assets otherwise than under her deceased husband's will, nor could she so contend because under the New Mexico law, a husband may, as her husband did here, dispose of his interest in the community property by will.[1] Neither is it contended that there remained assets in his estate sufficient to pay this additional tax. The determinative question is, being a legatee, is she liable under federal law for this tax as a transferee?

The Federal Statute does not define transferees within

[1] 29-1-9, New Mexico Statutes, 1953.

the meaning of 311 (a). Section 311 (1) (f), among others, includes in the classification of a transferee, "heirs, legatees, devisees and distributees." The term, however, has a well defined meaning and has been judicially defined as follows: "A transferee within the meaning of 311 (a) is one who takes or receives property of another without full, fair and adequate consideration to the prejudice of creditors.'" Appellee is a transferee of the assets she received by will of her deceased husband under Section 311 (1) (f), which includes in the classification of transferee, "heirs, legatees, devisees and distributees."

Section 311 (a) (1) imposes upon a transferee, for the purpose of collecting taxes due from a transferor, "The liability at law or in equity of a transferee of property of a taxpayer in respect of the tax * * *." The federal law does not define the liability of a transferee other than stating that it is the liability at law or in equity. We look to the state law to determine what the liability of a transferee for the debts of the transferor is. This subject was fully explored and discussed by the Supreme Court in the late case of Commissioner v. Stern, 357 U. S. 39. The effect of the decision is that if, under state law, the assets of a transferor, who becomes insolvent by virtue of such transfer, can be reached in the hands of his transferee by his creditors, they can be reached by the federal government for the purpose of subjecting them to the tax liability of the transferor. Under 29-1-9, New Mexico Statutes, 1953, these assets in the hands of the appellee are subject to the claims of creditors of the deceased husband, and are, therefore, subject to the government's tax claim unless barred by other principles of law.

It is well settled that the government may proceed against property in the hands of a transferee after it has lost its right to proceed against the taxpayer, providing it proceeds within the additional year specified in the Statute.[2] As indicated, this proceeding was instituted within the additional year.

[1] First National Bank of Chicago v. Commissioner, 235 F. 2d, 739
[2] City National Bank v. Commissioner, 55 F. 2d, 1073,
Ehrlich v. Commissioner, 77 F. 2d, 180

Appellee, in her brief, speaks of secondary liability and seems to be the view that secondary liability and transferee liability are the same, and covered by the same principles of law. There is no relation between secondary liability, as ordinarily understood, and transferee liability. Secondary liability is a personal liability which attaches when the remedy against the one primarily liable has been exhausted. It is a personal liability which may be satisfied from all the assets of the one secondarily liable. Transferee liability, on the other hand, imposes no personal liability. It subjects only the property in the hands of the transferee to the debts of the transferor. It is a proceeding in rem against the property or fund which the transferee received from the transferor burdened with his debts.[1]

Had appellee not been the wife of the deceased taxpayer, and jointly and severally liable for the tax in question, obviously, under the facts of this case, she would be liable to the extent of the value of the property that she has received from him as a transferee, notwithstanding the fact that the government had lost the right to proceed against him or against his estate because of the lapse of time. So also, if an action against her as one primarily liable for the tax had not been lost by the lapse of time, what principle of equity would prevent the government from ignoring her personal liability and seek only to subject, to the satisfaction of its claim, the property of his which she held in the nature of a trust fund? Why should the law be otherwise merely because the government has lost its right to proceed against her directly? She is still a transferee and as such has in her possession property subject to the claims of the deceased husband's creditors. Her liability to respond as a transferee stems from the fact that she holds property as a transferee in which his creditors have an interest because the transfer results in his insolvency.

Such cases as Oswego Falls Corporation, 26 B. T. A., 60, and Commissioner v. Stern, 357 U. S., 39, do not sustain appellee's contention that one may not be both primarily

[1] Commissioner v. Henderson's Estate, 147 F. 2d, 619; Harrison v. Commissioner, 173 F. 2d, 736.

liable and liable as a transferee. In the Oswego Falls case, three existing corporations were merged into a new corporation which took over all the assets of the three now defunct corporations. Under New York law, the transferee corporation became liable for all debts of the transferor corporations irrespective of the value of the assets transferred. All that was decided was that under New York law, there was absolute liability for all debts of the merged corporations enforceable in the same manner as though the new corporation had itself incurred the obligations. In the Stern's case, were involved the proceeds of a life insurance policy of a taxpayer who died insolvent owing the federal government income taxes. His wife was the beneficiary and received the proceeds of the policy. The government sought to reach these funds in her hands as a transferee. While the Supreme Court did not decide whether she was a transferee, the effect of the decision is that even if she were a transferee, the government could not reach these funds for the satisfaction of his debts. The basis of the decision was that under Louisiana law, the creditors of his estate could not reach these funds, and, therefore, the government could not reach them under the transferee statute. Neither of these cases, in our opinion, supports the contention that transferee liability may not be asserted against one having received assets by transfer, without full consideration, merely because the transferee may also be primarily liable.

It is our conclusion that the government may proceed against the fund appellee holds as a transferee, notwithstanding it has lost its right to proceed against her personally as one liable for the entire tax.

Because the merits of appellee's assertion that the assessment of the deficiency tax and interest was erroneous was not reached nor considered by the summary judgment, the case is reversed and remanded for the determination of that issue.

REVERSED AND REMANDED.

Filed March 21, 1960.

Internal Revenue Code of 1939:

Sec. 51. Individual Returns

(b) (as amended by Sec. 303, Revenue Act of 1948, c. 168, 62 Stat. 110) Husband and wife. —

(1) In general. — A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.
(26 U. S. C. 1952 ed., Sec. 51.)

Sec. 275. Period of Limitation Upon Assessment and Collection.

(c) Omission from gross income. — If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed.
(26 U. S. C. 1952 ed., Sec. 275.)

Sec. 311. Transferred Assets.

(a) Method of collection. — The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection and the provisions prohibiting claims and suits for refunds):

(1) Transferees. — The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional

amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

(b) Period of limitation. — The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) In the case of the liability of an initial transferee of the property of the taxpayer — within one year after the expiration of the period of limitation for assessment against the taxpayer;

(d) Suspension of running of statute of limitations. — The running of the statute of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing to the transferee or fiduciary of the notice provided for in section 272(a), be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for sixty days thereafter.

(f) Definition of 'Transferee'. — As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(26 U. S. C. 1952 ed., Sec. 311.)

29-1-9, New Mexico Statutes Annotated

DEATH OF HUSBAND—COMMUNITY PROPERTY.—Upon the death of the husband one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance and the charge and expenses of administration.

Appendix D

JUDGMENT

First Day, March Term, Monday, March 21st, 1960.

Before Honorable Walter A. Huxman, Honorable John C. Pickett and Honorable Jean S. Breitenstein, *Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for further proceedings in accordance with the views expressed in the opinion of the court.

(On April 26, 1960, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said Court, was issued to the United States District Court.)